(2) Supreme Court, U.S.
FILED

No. 05-367 SEP 16 2005

In The
Supreme Court of the United States

JOSEPH R. ANDERER, JR.,
Petitioner,

v.

POLICE CHIEF ARTHUR JONES, ET AL.,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

William R. Rettko
Counsel of Record
Rettko Law Offices, S.C.
15430 W. Capitol Drive, Suite 200
Brookfield, WI 53005-2621
(262) 783-7200
Attorneys for Petitioner

QUESTIONS PRESENTED FOR REVIEW

Whether a suspect's refusal to respond to potentially incriminating and compelled inquiry in a criminal investigation can be used to elevate reasonable suspicion to probable cause under the Fifth Amendment's privilege against self-incrimination?

When investigating police officers are confronted with a completely unreliable witness whose statement is insufficient to form probable cause, does the Fourth Amendment right to be secure against unreasonable search and seizures require the investigating police officers to investigate further?

PARTIES TO PROCEEDING

The petitioner is Joseph R. Anderer, Jr.,

The respondents are Police Chief Arthur L. Jones, Deputy Inspector Charles R. Grisham, Lt. Detective Mary Hoerig, Detective Mercedes Cowan, and City of Milwaukee.

RULE 29.6 STATEMENT

Joseph R. Anderer, Jr. is the full name of the petitioner. Anderer is an individual and not a corporation, as was identified in the disclosure statement filed with the Seventh Circuit Court of Appeals on October 22, 2002 in Appellate Court No. 02-3669.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO PROCEEDING ii

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

OPINIONS BELOW FOR WRIT OF CERTIORARI 1

STATEMENT ON THE BASIS FOR JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

ARGUMENT SUPPORTING ALLOWANCE OF THE WRIT 12

I. The decision below violates the perimeters of the Fourth and Fifth Amendments to the United States Constitution by approving the Milwaukee Police Department's use of Anderer's refusal to answer questions after being apprised he was a suspect in a criminal investigation as a factor in establishing probable cause for his arrest 12

II. Without more than the statement of an unreliable witness, there was no probable cause to arrest

Anderer making his arrest a violation of the Fourth Amendment. 15

CONCLUSION 22

APPENDIX

United States Court of Appeals for the Seventh Circuit Order dated October 6, 2004 ..... App. 1

United States Court of Appeals for the Seventh Circuit Order Denying Petition for Rehearing and Rehearing En Banc dated June 21, 2005 ..... App. 95

United States District Court for the Eastern District of Wisconsin Order Granting Defendants' Motion for Summary Judgment dated September 30, 2002 ... App. 114

Decision of the Board of Fire and Police Commissioners of the City of Milwaukee on Motion to Hear and Rule on Pending § 1983 Constitutional Claims dated October 24, 2001 ..... App. 128

TABLE OF AUTHORITIES

Page

Cases

Anderer v. Jones, 342 F.Supp.2d 799 (E.D. Wis. 2002)..1, 14

Anderer v. Jones, 385 F.3d 1043 (7th Cir. 2004)..... passim

Anderer v. Jones, 412 F.3d 794 (7th Cir. 2005)..... passim

Atwell v. Lisle Park Dist., 286 F.3d 987 (7th Cir. 2002).....13

Beauchamp v. City of Noblesville, 320 F.3d 733 (7th Cir. 2003).....15, 20

Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949).....15

Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925).....15

Counselman v. Hitchcock, 142 U.S. 547, 12 S.Ct. 195, 35 L.Ed. 1110 (1892).....13

Driebel v. City of Milwaukee, 298 F.3d 622 (7th Cir. 2002).....12

Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983).....15

Hebron v. Touhy, 18 F.3d 421 (7th Cir. 1994).....16, 20

Hiibel v. Sixth Judicial Dist. Court, 542 U.S. 177, 124 S.Ct. 2451, 159 L.Ed.2d 292 (2004).....13, 14

Hoffman v. United States, 341 U.S. 479, 71 S.Ct. 814, 95 L.Ed. 1118 (1951) 13

Ornelas v. United States, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996) 16

Spiegel v. Cortese, 196 F.3d 717 (7th Cir. 2000) 16

Tom v. Voida, 963 F.2d 952 (7th Cir. 1992). 14

United States v. Mendenhall, 446 U.S. at 556, 100 S.Ct. 1870) 15

Other Authorities

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 10

42 U.S.C. § 1983 ..... 1, 2, 9

U.S. CONST. amend IV 2, 15

U.S. CONST amend V. 2, 13

OPINIONS BELOW FOR WRIT OF CERTIORARI

The opinion of the United States Court of Appeals for the Seventh Circuit is published at 385 F.3d 1043 (7th Cir. 2004). This opinion was amended on denial of rehearing on June 21, 2005 as published at 412 F.3d 794 (7th Cir. 2005). Petition for Rehearing and Rehearing En Banc was denied on June 21, 2005 and published at 412 F.3d 794 (7th Cir. 2005). The order of the United States District Court for the Eastern District of Wisconsin granting defendants' motion for summary judgment on September 30, 2002 is published at 342 F.Supp.2d 799 (E.D. Wis. 2002). The October 24, 2001 Decision of the Board of Fire and Police Commissioners of the City of Milwaukee on Motion to Hear and Rule on Pending § 1983 Constitutional Claims is an unpublished document. All opinions and orders are reproduced in the appendix to this petition.

STATEMENT ON THE BASIS FOR JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued its opinion on October 6, 2004, and its opinion amending their October 6, 2004 opinion and denying the petition for rehearing and rehearing en banc was entered on June 21, 2005. (App. at 1, 95). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. CONST. amend. IV.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when an actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S. CONST. amend V.

Every person who, under color or any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act or Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. 42 U.S.C. § 1983.

STATEMENT OF THE CASE

On April 17, 2001, a juvenile ("J.R."), together with three other juveniles were arrested for burglary of a boat at the Pump House Marina on Milwaukee's south side. (App. 22-24). Three of the four juveniles were taken into custody by Officers Logan and Cook and transported to the second precinct police station in Officers Logan and Cook's squad. (Id., at 24). The fourth juvenile, J.R., was escorted by petitioner ("Anderer") to his squad car. (Id., at 24). In doing so, Anderer positioned J.R. in his squad and then proceeded to the second precinct. (Id., at 24-25). Anderer's transport of J.R. from the Pump House Marina to the second precinct took two minutes and two seconds. (Id., at 25).

When J.R. was removed from Anderer's squad at the second precinct by Officer Cook there was blood dripping from J.R.'s nose onto his chin. (Id.) Sergeant Jones, the supervising officer in charge of the seven police officers involved in the apprehension of the four juvenile burglars at the Pump House Marina, approached J.R. and asked him why he was bleeding. (Id., at 23-25). J.R. while laughing and joking with the three other juveniles pointed at Anderer and said, "That officer hit me," and then pointed at Officer Cook and said, "That officer raped me." (Id., at 25, 47 at n.13). Upon further questioning, J.R. claimed that Anderer, "hit [him] when he put [him] in the [squad] car." (Id., at 25).

Sergeant Jones then asked Anderer how J.R. got the bloody nose, to which Anderer responded, "How would I know . . . I just transported him." (Id., at 2). J.R. in a written complaint with Sergeant Jones then explained that, "He said something to [Anderer]," who "told him 'don't get smart' and [then] hit him one time [on] the mouth and nose [and] g[ave] him a bloody nose and bloody lip." (Id., at 25).

Detectives William Smith and Michelle Harrison from the Milwaukee Police Department ("MPD") Internal Affairs Division ("IAD") were dispatched to the second precinct to investigate J.R.'s complaint. (Record 26, Hoerig Aff., Ex. 1001, at p. 5). Detective Smith interviewed J.R. who explained that Anderer placed him in Anderer's squad but did not close the door. (App. 3). J.R. then explained that Anderer asked him what Officer Cook did to him. (Id.) According to J.R., he told Anderer that Officer Cook had nudged his buttocks with a flashlight to which Anderer yelled at him and said he shouldn't be making up "bullshit lies." (Id.) J.R. next stated that he got smart with Anderer, and then ignored Anderer by looking away, and when he turned back to face Anderer, that was when Anderer struck him in the face causing his nose and mouth to start bleeding. (Id.) J.R. also added that during transport to the second precinct Anderer yelled at him by saying, "Do you understand me?", stopped the squad, got out of the squad, opened J.R.'s door, and said he was going to "whip [J.R.'s] ass." (Id., at 3, 69-70). J.R. further added that he was unsure if anyone witnessed this because he and Anderer were alone in the squad. (Id.)

Detective Harrison interviewed Sergeant Jones who explained that after the juveniles were apprehended, he spoke with a citizen witness to the burglary, but overheard the juveniles using profanities and giving Officers Cook and Logan a hard time. (Record 26, Hoerig Aff., Ex. 1001 at 17-18). Sergeant Jones further indicated he did not observe any of the juveniles being placed into squads for conveyance, but there was no evidence of fighting or injuries regarding the juveniles at the scene. (Id., at 18). In addition, Sergeant Jones confirmed J.R. was now saying that Anderer hit him while placing him in the squad, but did not make any complaint about being hit by a police officer at the scene. (Id., at 18-19). Sergeant Jones also stated he was on the scene for five to ten minutes after the squads left with the juveniles for the

second precinct as he was speaking with a citizen witness. (Id., at 18).

While Detectives Smith and Harrison were conducting their investigation of J.R.'s battery complaint, Officer Cook contacted J.R.'s mother to inform her that J.R. had been arrested. (App. 3). J.R.'s mother admitted she was not surprised J.R. was arrested for burglary and that J.R. was taking several prescription medications two of which Cook recognized to help control a person's mental state. (Id.) J.R.'s mother then told Cook that J.R. had not taken his medication that day and needed to be released from custody as soon as possible. (Id.) Cook then informed Detectives Smith and Harrison of his contact with J.R.'s mother and that J.R.'s mother had informed him that J.R. was on a variety of drugs which he had not taken all day and should be released as soon as possible. (Id., at 3-4).

At about 10:05 p.m., MPD Identification Technician Brown appeared at the second precinct at the request of Detective Smith to take pictures of J.R. (Record 62, Brown Aff., at pp. 1, 5). Detective Smith then directed Brown to take four pictures of J.R. which included an overall picture of J.R. from head to ankle, a picture of J.R.'s pants, a picture of J.R.'s shirt, and a close up of J.R.'s face with J.R. pulling down his lower lip to show the inside of his lower mouth. (Id., at p. 7). Detective Smith then reported that J.R. appeared to have sustained a laceration to his upper and lower lips and there was dried blood on his pants and shirt. (Record 26, Hoerig Aff., Ex. 1001 at p. 8).

Then at about 10:45 p.m., Detectives Smith and Harrison tried to interview Officers Logan and Cook, but both officers declined to be interviewed without union representation. (Id.) Nonetheless, these detectives were able to interview Officer Shoman at about 10:55 p.m. (Id., at p. 19). In conducting this interview, it was learned that Shoman responded to the boat burglary and when she arrived, four